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## The Seventh Circuit Pulls the Ladder Out From Under Design Defect Plaintiffs: Bielskis v. Louisville Ladder and the Limits of Judicial Discretion in Assessing the Reliability of an Expert's Methodology

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**THE SEVENTH CIRCUIT PULLS THE LADDER  
OUT FROM UNDER DESIGN DEFECT PLAINTIFFS:  
*BIELSKIS V. LOUISVILLE LADDER* AND THE LIMITS  
OF JUDICIAL DISCRETION IN ASSESSING THE  
RELIABILITY OF AN EXPERT'S METHODOLOGY**

BEVIN CARROLL\*

Cite as: Bevin Carroll, *The Seventh Circuit Pulls the Ladder Out From Under Design Defect Plaintiffs: Bielskis v. Louisville Ladder and the Limits of Judicial Discretion in Assessing the Reliability of an Expert's Methodology*, 7 SEVENTH CIRCUIT REV. 99 (2012), at <http://www.kentlaw.iit.edu/Documents/AcademicPrograms/7CR/v7-2/carroll.pdf>.

INTRODUCTION

Trial judges are considered the gatekeepers of expert testimony and have vast discretion in determining whether an expert's methodology is reliable.<sup>1</sup> The Seventh Circuit recently addressed the discretionary role that district courts play in assessing the reliability of an expert's opinion in *Bielskis v. Louisville Ladder*, where it upheld the exclusion of plaintiff's expert in a design defect action due to the plaintiff's failure to meet the standards of reliability set forth under the Federal Rules of Evidence and *Daubert*.<sup>2</sup> *Bielskis* illustrates not only the subjective nature of the district court's assessment, but also the difficulty in successfully challenging a district court's determination of

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<sup>1</sup> See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993); FED. R. EVID. 702 advisory committee's note.

<sup>2</sup> *Bielskis v. Louisville Ladder*, 663 F.3d 887, 897, 893-94 (7th Cir. 2011).

admissibility due to the deferential standard applied on appeal.<sup>3</sup> Further, *Bielskis* reminds us of the importance of ensuring that expert witnesses utilize a reliable methodology in formulating their opinions so as to avoid presenting the court with an opportunity to dismantle the entire case due solely to its subjective dissatisfaction with a party's expert.<sup>4</sup>

Part I of this note will discuss how to establish liability in design defect cases by exploring the history of the risk-utility and consumer-expectation tests as well as the standards of proof for design defect cases required by each state comprising the Seventh Circuit. Part II of this note will then discuss federal procedural standards for the admissibility of expert testimony under Federal Rule of Evidence 702 and the *Duabert* Trilogy. Part III of this note will provide an overview of both the Seventh Circuit and the United States District Court for the Northern District of Illinois' rulings in *Bielskis*. Part III will also argue that while the Seventh Circuit was correct in affirming the district court's exclusion of plaintiff's expert in this instance, district courts must adhere to the liberal underpinnings of Federal Rule of Evidence 702 and its subsequent case law when performing the admissibility inquiry, rather than take advantage their discretionary power and deferential standard of review in order to dismiss those experts that do not meet their personal satisfaction.

## ESTABLISHING LIABILITY IN DESIGN DEFECT CASES

### *A. History of the Risk-Utility Test v Consumer Expectation Test*

The first articulated standard of liability in design defect cases was set forth in the Restatement (Second) of Torts § 402A, which provided that liability exists “only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.”<sup>5</sup> Although the text of Section 402A did not explicitly mandate the use

<sup>3</sup> See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141-142 (1997).

<sup>4</sup> See *id.*

<sup>5</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965).

of the consumer expectation test as a means of proving a product was unreasonably dangerous, comment i to Section 402A implicitly established the test by stating, “[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”<sup>6</sup>

The consumer expectation test was intended to provide an objective standard of proof based on the normal, ordinary and reasonable expectations of the average person<sup>7</sup>, but dissatisfaction with the consumer expectation test arose soon after its implementation.<sup>8</sup> First, scholars found that the expectations of consumers provide an unwieldy, amorphous basis on which to assess manufacturer liability and that application of such a subjective and intuitive test could be easily manipulated to achieve a desired outcome.<sup>9</sup> In addition, some attacked the test’s lack of guidance in cases where the product-caused harm affects third parties who have neither purchased nor consumed the product, and in situations where consumers have not formed specific expectations as to the product.<sup>10</sup> Lastly, concerns arose that the test has the practical effect of working against consumers under circumstances in which the manufacturer’s liability would further the interests of products liability law.<sup>11</sup> This could occur if consumers’ expectations lag behind manufacturers’ advancing technologies or if consumers have pre-existing expectations that a product may be defective.<sup>12</sup>

In response to these concerns, the Supreme Court of California in *Barker v. Lull Engineering Co.* established the risk-utility test, which provides that a design defect may be proven by a demonstration that either: (1) the product failed to perform as safely as an ordinary

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<sup>6</sup> *Id.* at cmt. i.

<sup>7</sup> See American Law of Products Liability 3d § 17:21.

<sup>8</sup> See Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1715 (2003).

<sup>9</sup> See *id.*

<sup>10</sup> See *id.* at 1716.

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

consumer would expect under normal operating circumstances; or (2) the risks inherent in the product's design outweigh the benefits of that design.<sup>13</sup> In 1997, the Restatement (Third) of Torts adopted its own version of this risk utility test requiring plaintiffs to show that “the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design”.<sup>14</sup> Most states now apply the Restatement’s risk utility test to design defect cases; however there are still a handful of states that apply a two prong test similar to the court in *Barker*, and few others still adhere only to the consumer expectation test.<sup>15</sup>

*B. Standard of Proof in Design Defect Cases as Applied by District Courts Comprising the Seventh Circuit*

This section discusses the standards of proof for design defect cases required by each state comprising the Seventh Circuit. Under the well-established *Erie* doctrine, a federal court sitting in diversity jurisdiction will apply the substantive law of the state in which it sits<sup>16</sup>, while simultaneously using federal law to resolve procedural and evidentiary issues.<sup>17</sup> Therefore, a federal court sitting in diversity will apply the state law regarding the standards of proof and elements required to show a product was defectively designed.<sup>18</sup>

1. Indiana

Indiana’s substantive law pertaining to liability for defective design is set forth in the Indiana Product Liability Act.<sup>19</sup> To establish a *prima facie* case of liability under the Act, the plaintiff must show that: “(1) the product is defective and unreasonably dangerous; (2) the

<sup>13</sup> *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 455-56 (Cal. 1978).

<sup>14</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2b (1998).

<sup>15</sup> See generally American Law of Products Liability 3d § 17:21.

<sup>16</sup> *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (7th Cir. 1994).

<sup>17</sup> *Colip v. Clare*, 26 F.3d 712, 714 (7th Cir. 1994).

<sup>18</sup> See *Erie*, 304 U.S. at 78.

<sup>19</sup> IND. CODE ANN. § 34-20-1-1 (West 2012).

defective condition existed at the time the product left the defendant's control; and (3) the defective condition was a proximate cause of the plaintiff's injuries."<sup>20</sup> In determining whether a product design is "unreasonably dangerous", Indiana is one of the few states that still applies only the consumer expectation test.<sup>21</sup>

## 2. Wisconsin

Wisconsin is also part of the minority that applies solely the consumer expectation test when determining whether a product is defectively designed.<sup>22</sup> Although Wisconsin has recognized the new insights into products liability provided by the Restatement (Third) of Torts<sup>23</sup>, it has thus far rejected the adoption the Restatement's risk-utility test.<sup>24</sup> However, Justice Prosser's concurrence, which was joined by Justice Ziegler and Justice Gablema, in *Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co.* suggests that the Wisconsin Supreme Court may be willing to adopt the risk-utility test should the opportunity present itself.<sup>25</sup> In *Godoy*, the plaintiffs brought product liability and negligence claims against manufacturers of lead pigment under a risk-utility theory.<sup>26</sup> The defendants moved to dismiss the design-defect claims arguing that white lead carbonate cannot be made without lead, and therefore, the plaintiff's complaint essentially asserted that the defendants should have made a different product.<sup>27</sup>

<sup>20</sup> *Natural Gas Odorizing, Inc. v. Downs*, 685 N.E.2d 155, 160 (Ind. Ct. App. 1997).

<sup>21</sup> *See, e.g., Montgomery Ward & Co. v. Gregg*, 554 N.E.2d 1145, 1165-66 (Ind. Ct. App. 1990) (noting that "[t]hrough other jurisdictions have adopted a [risk-utility] standard . . . Indiana has not moved toward the use of a utility/risk formula to assess unreasonableness in strict product liability cases").

<sup>22</sup> *See Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co.*, 768 N.W.2d 674, 696 (Wis. 2009) (Prosser, J., concurring).

<sup>23</sup> *Haase v. Badger Mining Corp.*, 682 N.W.2d 389, 394 (Wis. 2004).

<sup>24</sup> *Id.*

<sup>25</sup> *See Godoy*, 768 N.W.2d at 692-700.

<sup>26</sup> *Id.* at 679.

<sup>27</sup> *Id.* at 679-80.

The Wisconsin Supreme Court majority agreed that a claim for defective design cannot be maintained when the alleged defect is an essential characteristic of the product itself.<sup>28</sup> The majority opinion also reaffirmed that Section 402A of the Restatement (Second) of Torts continues to remain the touchstone of Wisconsin's analysis for strict products liability.<sup>29</sup> Although the court was not tasked with deciding upon the application of a risk utility test in this case, the tenor of Justice Prosser's concurrence suggests that the court would if given the opportunity.<sup>30</sup> The concurring opinion expressed concerns that section 402A of the Restatement (Second) of Torts no longer reflects the emerging complexities of products liability law.<sup>31</sup> Justice Prosser also notes that Wisconsin is one of only six states that "clings to the consumer contemplation test" as the sole means of analyzing design-defect claims.<sup>32</sup>

### 3. Illinois

In 1965, the Illinois Supreme Court adopted the Second Restatement of Tort's doctrine of strict liability, which imposed strict liability on a seller of "any product in a defective condition unreasonably dangerous to the user or consumer or to his property" through the consumer expectation test.<sup>33</sup> Illinois courts, however, recognized the problems associated with the consumer expectation test<sup>34</sup> and have accepted the rationale for the risk utility test as laid out

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<sup>28</sup> *Id.* at 687. The court's holding seems to suggest that there can be no products liability when a design defect is a characteristic of the product itself. However, in instances where the product is inherently dangerous (i.e. it cannot be made safer, yet is useful in spite of its dangers), plaintiffs can bring failure to warn claims against defendant manufacturers. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965).

<sup>29</sup> *Godoy*, 768 N.W.2d at 682.

<sup>30</sup> *See Godoy*, 768 N.W.2d at 692-700.

<sup>31</sup> *See id.* at 694 (Prosser, J., concurring).

<sup>32</sup> *Id.* at 696 (Prosser, J., concurring).

<sup>33</sup> *Suvada v. White Motor Co.*, 210 N.E.2d 182, 187 (Ill. 1965).

<sup>34</sup> *See Blue v. Env'tl. Eng'g, Inc.*, 828 N.E.2d 1128, 1138 (Ill. 2005) (explaining that, "[i]t became apparent, however, that [the Restatement] created to address

by the California Supreme Court in *Barker* as an alternative means for proving liability.<sup>35</sup> Such rationale includes the concepts that the consumer expectation test should be reserved only for use in cases in which the everyday experiences of a product's consumers allow them to make a valid judgment on its safety and that not all consumers will be able to understand how safe an inherently complex and dangerous product could be made.<sup>36</sup>

Thus, Illinois courts permit a plaintiff to use either the consumer expectation test or the risk-utility test to prove that the product is "unreasonably dangerous" in a strict liability design defect case.<sup>37</sup> A plaintiff can employ the consumer expectation test by introducing evidence that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or the "risk utility test" by introducing evidence that the product's design proximately caused his injury and that the risk of danger inherent in the challenged design outweighs the benefits of such design."<sup>38</sup>

### *C. Expert Testimony is Required to Establish Liability in Most Design Defect Cases.*

Expert testimony has historically been required to establish a design defect through the risk-utility test, when the design is not blatantly defective<sup>39</sup> and when an understanding of the technical, scientific nature of the defect is beyond the general experience or common understanding of laypersons.<sup>40</sup> Correspondingly, courts have

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manufacturing defects, did not adequately cover design defects or defects based on inadequate warnings").

<sup>35</sup> *Calles v. Scripto-Tokai Corp.*, 864 N.E.2d 249, 255 (Ill. 2007).

<sup>36</sup> *See id.* at 255-256.

<sup>37</sup> *Lamkin v. Towner*, 563 N.E.2d 449, 457 (Ill. 1990).

<sup>38</sup> *Hansen v. Baxter Healthcare Corp.*, 764 N.E.2d 35, 43 (Ill. 2002) (citing *Lamkin*, 563 N.E.2d at 457).

<sup>39</sup> Meaning, where the *existence* of a defect is not beyond the common understanding of a lay juror. *See, e.g., Owens v. Ford Motor Co.*, 297 F. Supp. 2d 1099, 1103-04 (S.D. Ind. 2003).

<sup>40</sup> *Id.* at 1103.



generally held that expert testimony is not always required to establish a design defect through the consumer expectations test when the lay person's understanding would constitute a basis for a legal inference and not mere speculation.<sup>41</sup> However, the Seventh Circuit's recent decision in *Show v. Ford* demonstrated the need for expert testimony to establish liability in most design defect claims regardless of whether they are brought under the risk utility test or the consumer expectations test.<sup>42</sup>

In *Show*, a 1993 Ford Explorer was struck by another car near the left rear wheel while passing through an intersection.<sup>43</sup> The Explorer rolled over, injuring the driver of the car and a passenger.<sup>44</sup> The plaintiffs filed suit against Ford alleging that the Explorer's defective design rendered it unstable.<sup>45</sup> The plaintiffs did not retain an expert to testify as to the vehicle's defective design and argued that expert testimony was unnecessary under the consumer-expectation test because "jurors, as consumers, can find in their own experience all of the evidence required for liability."<sup>46</sup> The Seventh Circuit affirmed the district court's holding that the plaintiffs could not establish a prima facie case of a design defect in the Explorer without expert testimony, even under the consumer expectations test.<sup>47</sup> The court reasoned that the consumer-expectation test is not an independent theory of recovery, but rather a factor subsumed within the broader risk-utility

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<sup>41</sup> *Id.*; See also *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 554, (2008) (explaining, "[t]he consumer-expectation test is a single-factor test and, therefore, narrow in scope . . . The jury is asked to make a single determination: whether the product is unsafe when put to a use that is reasonably foreseeable considering its nature and function. No evidence of ordinary consumer expectations is required, because the members of the jury may rely on their own experiences to determine what an ordinary consumer would expect" (citing *Besse v. Deere & Co.*, Ill. 3d 497, 500 (1992) and *Mele v. Howmedica, Inc.*, Ill. 3d 1, 14 (2004))).

<sup>42</sup> See *Show v. Ford Motor Co.*, 659 F.3d 584, 587. (7th Cir. 2011).

<sup>43</sup> *Id.* at 584.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 585.

<sup>47</sup> *Id.* at 587-588 (noting that it "takes expert evidence to establish a complex product's unreasonable dangerousness through a consumer-expectations approach").

test.<sup>48</sup> Just as the risk-utility test indisputably requires expert testimony, the consumer expectations test does as well.<sup>49</sup>

The court also emphasized that expert testimony is required to establish the unreasonable dangerousness of a complex product, such as a car, through a consumer-expectations approach.<sup>50</sup> Without the assistance of expert testimony in a complex products-liability case, a jury would have to speculate about matters outside its understanding.<sup>51</sup> However, given the court's reference to the vehicle as a "complex product"<sup>52</sup>, it is unclear whether the Seventh Circuit's holding requiring expert testimony extends to simple product defects that can be easily understood through the jurors' own experiences and understanding.

It should be noted that the Seventh Circuit focused much of its opinion in *Show* on whether the need for expert testimony is one of substantive or procedural law.<sup>53</sup> Ultimately, because both parties assumed that state law determines whether expert testimony is required, the court decided it under Illinois law and did not have to rule on the issue.<sup>54</sup> However, the court's dicta indicates that there may be a question as to whether Illinois treats the risk-utility and consumer-expectation tests as substantive or procedural in nature.<sup>55</sup> The court highlights the Illinois Supreme Court's statement in *Mikolajczyk* that "[the consumer-expectation test and the risk-utility test] . . . are not *theories of liability*; they are *methods of proof* by which a plaintiff 'may demonstrate' that the element of unreasonable dangerousness is met."<sup>56</sup> Thus, the court suggests that the two tests are

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<sup>48</sup> *Id.* at 587.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 588.

<sup>52</sup> *Id.* at 585.

<sup>53</sup> *See id.* at 585-87.

<sup>54</sup> *Id.* at 585 (explaining, "[t]he assumption rests on a belief that the quality of proof is part of the claim's substantive elements, which depend on state law under the *Erie* doctrine even when substantive doctrine is implemented through evidentiary rules").

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 585-86 (citing *Mikolajczyk*, 231 Ill.2d at 548).

simply procedural in nature and thus federal law would apply when determining whether expert testimony is required to sustain a products liability claim.<sup>57</sup>

## FEDERAL ADMISSABILITY OF SCIENTIFIC EVIDENCE

### *A. Frye v. United States*

The United States Court of Appeals for the District of Columbia Circuit's 1923 decision in *Frye v. United States* marked the first judicial establishment of an evidentiary standard for the admissibility of scientific expert evidence.<sup>58</sup> In *Frye*, the defendant offered an expert witness to testify as to the results of a systolic blood pressure deception test, a precursor to the polygraph lie detector, as evidence of his innocence of a murder conviction.<sup>59</sup> The court established the general acceptance test, which provides that novel scientific expert evidence is only admissible when the scientific principle or technique from which it is deduced has gained general acceptance in its field.<sup>60</sup> Because the systolic blood pressure deception test had not yet gained scientific standing among physiological and psychological authorities, the court excluded the defendant's expert from testifying as to the test's results.<sup>61</sup>

Since *Frye*'s general acceptance test was the sole requisite for expert admissibility, theories or techniques not generally accepted in the scientific community were inadmissible without exception.<sup>62</sup> By "abdicating . . . to scientists the responsibility for ruling on the admissibility of evidence", *Frye* diminished judicial discretion and

<sup>57</sup> *Id.* at 586.

<sup>58</sup> Bert Black, *A Unified Theory of Scientific Evidence*, 56 FORDHAM L. REV. 595, 629 (1988) (citing E. Cleary, McCormick on Evidence § 203 at 608 (3d ed. 1984)).

<sup>59</sup> *Frye v. United States*, 293 F. 1013, 1013 (D.C. Cir. 1923).

<sup>60</sup> *Id.* at 1014.

<sup>61</sup> *Id.*

<sup>62</sup> See Judith A. Hasko, *Daubert v. Merrell Dow Pharmaceuticals, Inc.: Flexible Judicial Screening of Scientific Expert Evidence Under Federal Rule of Evidence 702*, 1995 WIS. L. REV. 479, 481 (1995).

removed a judge's ability to independently review the merits of the specific scientific evidence in a case.<sup>63</sup> The judiciary responded to *Frye*'s restraints on judicial discretion by manipulating their definitions of the scientific community or general acceptance in order to influence the determination of admissible evidence.<sup>64</sup> In this light, *Frye* failed to provide a workable cohesive standard of admissibility and effectively denied litigants the opportunity to present valid scientific evidence to support their claims.<sup>65</sup>

In 1975, Congress enacted the Federal Rules of Evidence, including Rule 702 which provided that "if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue", a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.<sup>66</sup> With no mention of *Frye* or the general acceptance test in either the language of Rule 702 or its legislative drafting history<sup>67</sup>, a debate arose regarding whether the common law general acceptance standard continued to be a viable means of determining the admissibility of expert testimony.<sup>68</sup> Many scholars interpreted the rule's silence to

<sup>63</sup> *Id.* at 482 (citing Paul C. Giannelli, *Frye v. United States, Background Paper Prepared for the National Conference of Lawyers and Scientists*, 99 F.R.D. 189, 191-93 (1983) and Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years--the Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 878 (1992) (quoting *United States v. Stifel*, 433 F.2d 431, 438 (6th Cir. 1970)).

<sup>64</sup> *See id.* at 482-483; *see also* David E. Bernstein, *The Admissibility of Scientific Evidence After Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 15 CARDOZO L. REV. 2139, 2140 (1994) (explaining, "[s]ome judges interpreted [the general acceptance] rule as allowing almost any credentialed scientist's testimony, however implausible, to be presented to a jury. This became known as the 'let-it-all-in' approach").

<sup>65</sup> *See Hasko, supra* note 57 at 482-83.

<sup>66</sup> FED. R. EVID. 702.

<sup>67</sup> FED. R. EVID. 702; PUB. L. NO. 93-595 (1975).

<sup>68</sup> *See, e.g.,* Becker & Orenstein, *supra* note 58 at 879; Hasko, *supra* note 57 at 484; Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745, 747 (1990).

suggest that the *Frye* test still applied as “[i]t would be odd if the Advisory Committee and the Congress intended to overrule the vast majority of cases excluding such evidence . . . without explicitly stating so.”<sup>69</sup> However, plain meaning jurisprudence restricted the continued application of *Frye* due to the absence of its mention in the rule or committee notes.<sup>70</sup> Thus, a split persisted amongst the federal courts as to the standard of expert admissibility.<sup>71</sup>

### *B. The Daubert Trilogy*

#### 1. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

In *Daubert v. Merrell Dow Pharm., Inc.*, the United States Supreme Court rejected *Frye*’s rigid general acceptance standard for admissibility and established a liberal approach, which placed complete discretion to screen scientific expert evidence in the hands of the judiciary.<sup>72</sup> In *Daubert*, plaintiffs sued the defendant pharmaceutical company to recover for limb reduction birth defects allegedly caused by the mothers’ prenatal ingestion of defendant’s anti-nausea drug Bendectin.<sup>73</sup> The plaintiffs offered the testimony of eight experts, who relied upon “in vitro” (test tube) and “in vivo” (live) animal studies, pharmacological studies, and reanalysis of previously published studies in concluding that Bendectin could cause birth defects.<sup>74</sup> However, the district court granted defendant’s motion for summary judgment, which contended that the plaintiffs would be

<sup>69</sup> U.S. v. Downing, 753 F.2d 1224, 1234 (3d Cir. 1985) (citing Saltzburg & Redden, Federal Rules of Evidence Manual 702 (3d ed. 1982)).

<sup>70</sup> 60 Am. Jur. Trials 1 (Originally published in 1996).

<sup>71</sup> Compare, Viterbo v. Dow Chem. Co., 826 F.2d 420 (5th Cir. 1987) and United States v. Downing, 753 F.2d 1224 (3d Cir.1985) (both finding the Rules do not incorporate *Frye*), with United States v. Smith, 869 F.2d 348 (7th Cir. 1989); United States v. Christophe, 833 F.2d 1296 (9th Cir.1987) and United States v. Distler, 671 F.2d 954 (6th Cir.) (all holding Rules do incorporate *Frye*).

<sup>72</sup> See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 579 (1993).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 583.

unable to come forward with admissible evidence showing Bendectin caused birth defects.<sup>75</sup> In relying on *Frye*'s general acceptance test, the United States Court of Appeals for the Ninth Circuit subsequently affirmed the District Court's decision on the grounds that plaintiffs' expert evidence was based on methodology that was not generally accepted as a reliable technique in the scientific community.<sup>76</sup> The Supreme Court vacated and remanded the judgment, holding that the *Frye* test was superseded by the adoption of the Federal Rules of Evidence<sup>77</sup> and that such "a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to opinion testimony.'"<sup>78</sup>

The Supreme Court noted that the Federal Rules of Evidence require the trial judge to act as a gatekeeper in determining whether an expert is proposing to testify as to scientific knowledge that will assist the trier of fact to understand or determine the fact at issue.<sup>79</sup> Such a determination entails a preliminary assessment of whether the methodology underlying the testimony is scientifically valid (i.e. reliable) and of whether the methodology can be applied to the facts in issue (i.e. relevant).<sup>80</sup> The *Daubert* Court set forth the following non-exhaustive guideposts to assist the district courts in determining whether proffered scientific expert testimony can be characterized as a reliable: (1) whether the theory has been or is capable of being tested; (2) whether the theory has been subjected to peer review and publication; (3) the theory's known or potential rate of error; and (4) the theory's level of acceptance within the relevant community.<sup>81</sup>

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<sup>75</sup> *Id.* at 582.

<sup>76</sup> *Id.* at 584.

<sup>77</sup> *Id.* at 587.

<sup>78</sup> *Id.* at 588 (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)).

<sup>79</sup> *Id.* at 592.

<sup>80</sup> *Id.* at 592-93.

<sup>81</sup> *Id.* at 593-94.

## 2. General Electric Co., et. al. v. Joiner

In *General Electric Co., et. al. v. Joiner*, the United States Supreme Court expanded on *Daubert* by establishing abuse of discretion as the proper standard to review a district court's ruling as to whether to admit or exclude expert scientific evidence.<sup>82</sup> In *Joiner*, the plaintiff, after being diagnosed with small-cell lung cancer, brought a claim alleging that his disease was promoted by workplace exposure to chemical polychlorinated biphenyls (PCB's) present in materials manufactured by the defendants.<sup>83</sup> The district court granted General Electric's motion for summary judgment, reasoning that plaintiff's experts' opinion that exposure to PCBs caused small-cell lung cancer did not rise above "subjective belief or unsupported speculation."<sup>84</sup> The Eleventh Circuit reversed and held that the district court erred in excluding the plaintiff's expert.<sup>85</sup> The court explained, "[b]ecause the Federal Rules of Evidence governing expert testimony display a preference for admissibility, we apply a particularly stringent standard of review to the trial judge's exclusion of expert testimony."<sup>86</sup> The Supreme Court of the United States granted certiorari and reversed the Appellate Court's decision.<sup>87</sup>

The Supreme Court majority held that the Court of Appeals erred in its holding of the exclusion of plaintiff's experts' testimony by applying an overly "stringent" review and failing to give the district court the "deference that is the hallmark of abuse-of-discretion review."<sup>88</sup> Abuse of discretion is the proper standard of review of a district court's evidentiary rulings and an appellate court will reverse a district court's ruling only if it is manifestly erroneous.<sup>89</sup> In applying an abuse of discretion review, a court of appeals may not categorically

<sup>82</sup> See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 139 (1997).

<sup>83</sup> *Id.* at 139.

<sup>84</sup> *Id.* at 140.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 141.

<sup>88</sup> *Id.* at 143.

<sup>89</sup> See *id.* at 141-142.

distinguish between rulings allowing expert testimony and those that do not.<sup>90</sup> Further, a court of appeals may not subject a district court's ruling to a more searching standard of review simply because its holding is outcome determinative, such as in the case of a ruling in favor of a motion for summary judgment.<sup>91</sup> The Seventh Circuit has explicitly affirmed its intention of applying this deferential standard of review.<sup>92</sup> For example, in *Bradley v. Brown*, the Seventh Circuit explained, "[the] decision to allow expert testimony is within the broad discretion of the trial judge and is to be sustained on appeal unless manifestly erroneous."<sup>93</sup>

### 3. *Kumho Tire Co., Ltd. v. Carmichael*

In *Kumho Tire Co., Ltd. v. Carmichael*, the plaintiffs brought a product liability action against the defendant tire manufacturer for injuries sustained when the right rear tire on a vehicle failed.<sup>94</sup> The plaintiffs' case relied heavily upon the opinion of their expert tire failure analyst that the blowout was caused by a defect in the tire's design.<sup>95</sup> His opinion was based upon a visual inspection of the tire and an application of his knowledge pertaining to tire blowouts to the facts at issue.<sup>96</sup> The district court granted defendant's motion to exclude the plaintiffs' expert on the basis that his methodology was unreliable; however, the Eleventh Circuit reversed the district court's holding on the belief that *Daubert* was only applicable to the scientific testimony and not to skill or experience based testimony.<sup>97</sup> The Supreme Court disagreed and held that a federal trial judge's gate keeping obligation applies not only to scientific testimony, but to all

<sup>90</sup> See *id.* at 136.

<sup>91</sup> See *id.* at 142-143. Practically, a trial court can avoid reversal of motion for summary judgment ruling on appeal by first striking the expert testimony necessary to establish the plaintiff's case.

<sup>92</sup> See *Bradley v. Brown*, 42 F.3d 434, 437 (7th Cir. 1994).

<sup>93</sup> *Id.*

<sup>94</sup> *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 142 (1999).

<sup>95</sup> *Id.*

<sup>96</sup> See *id.* at 144.

<sup>97</sup> *Id.* at 145-146.



expert testimony.<sup>98</sup> The Court also held that the Rule 702 inquiry is “a flexible one”<sup>99</sup> and a district court has broad discretion in determining which of the *Daubert* factors are pertinent in assessing reliability.<sup>100</sup> District courts may fulfill their gate keeping duty by performing any inquiry it chooses “so long as the content and purpose of *Daubert* is not forgotten.”<sup>101</sup> Thus, a court of appeals must give deference to both the trial court’s decision whether to admit expert testimony as well as the criteria used to make that decision.<sup>102</sup>

### C. JUDICIAL DISCRETION IN ASSESSING ADMISSABILITY OF EXPERT TESTIMONY

In 2000, Congress responded to *Daubert* and its progeny by amending Federal Rule of Evidence 702 to read as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.<sup>103</sup>

<sup>98</sup> *Id.* at 149.

<sup>99</sup> *Id.* at 150 (explaining, “The [*Daubert*] factors may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert’s particular expertise, and the subject of his testimony.” *Id.* at 138).

<sup>100</sup> *See id.* at 152.

<sup>101</sup> Jonathan R. Schofield, *A Misapplication of Daubert: Compton v. Subaru of America Opens the Gate for Unreliable and Irrelevant Expert Testimony*, 1997 B.Y.U. L. REV. 489, 513 (1997).

<sup>102</sup> *See Kumho Tire* at 158 (holding, “Rule 702 grants the district judge the discretionary authority, reviewable for its abuse, to determine reliability in light of the particular facts and circumstances of the particular case”).

<sup>103</sup> 5 Handbook of Fed. Evid. § 702:5 (7th ed.) (citing FED. R. EVID. 702 (effective December 1, 2000)). FED. R. EVID. 702 was restyled effective December

The Advisory Committee expressly noted that it did not amend Rule 702 in a specific attempt to codify the *Daubert* factors.<sup>104</sup> In fact, the committee note explains that any procedural requirements for the exercise of the trial court's gate keeping function are purposely absent from the amended rule in order to allow trial courts both flexibility and discretion in considering expert admissibility.<sup>105</sup> The committee note goes on to state, "[a] review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule."<sup>106</sup> Opinions are excluded when they are unhelpful and therefore superfluous and a waste of time.<sup>107</sup>

The amendment does not provide an automatic challenge to all expert testimony;<sup>108</sup> rather, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."<sup>109</sup> District courts do not have discretionary authority to "accept or reject" expert testimony, as this is part of the jury's fact finding role.<sup>110</sup> The district court need not determine whether the proposed expert testimony is irrefutable or correct since an expert's opinion is admissible so long as he can account for "how and why" the it was reached.<sup>111</sup> Therefore, an

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1, 2011, but all changes were intended to be stylistic in nature and did not effect the functionality of the rule. *See id.* and FED. R. EVID. 702 advisory committee's note.

<sup>104</sup> FED. R. EVID. 702 advisory committee's note.

<sup>105</sup> *See* FED. R. EVID. 702 advisory committee's note; *see also* Craig Lee Montz, *Trial Judges As Scientific Gatekeepers After Daubert, Joiner, Kumho Tire, and Amended Rule 702: Is Anyone Still Seriously Buying This?*, 33 UWLA L. REV. 87, 100-02 (2001).

<sup>106</sup> FED. R. EVID. 702 advisory committee's note.

<sup>107</sup> FED. R. EVID. 702 advisory committee's note (citing 7 Wigmore § 1918).

<sup>108</sup> FED. R. EVID. 702 advisory committee's note (citing *Kumho Tire*, 526 U.S. at 158).

<sup>109</sup> *Daubert*, 509 U.S. at 595.

<sup>110</sup> *See* Fed. R. Evid. 702 advisory committee's note (stating, "the amendment is not intended to limit the right to jury trial, nor to permit a challenge to the testimony of every expert, nor to preclude the testimony of experience-based experts, nor to prohibit testimony based on competing methodologies within a field of expertise").

<sup>111</sup> *Joiner*, 522 U.S. at 144.

expert's opinion is not considered unreliable simply because all other potential causes cannot be excluded, so long as the expert offered an explanation as to why a proffered alternative was not the sole cause.<sup>112</sup> The suggestion of an alternative cause affects the weight that the jury should give the expert's testimony rather than the admissibility of that testimony.<sup>113</sup>

Various circuits have articulated the need to restrict the district court's gate keeping function. The Second Circuit has explained that district courts must be restrained in their gate keeping function, as limitless discretion would "inexorably lead to evaluating witnesses credibility and weight of the evidence, the ageless role of the jury."<sup>114</sup> The Second Circuit further elaborated that "[d]isputes as to the strength of [an expert's] credentials, faults in his use of [a particular] methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony."<sup>115</sup> The Third Circuit has also stressed that the court is *only* a gatekeeper, as "[a] party confronted with an adverse expert witness who has sufficient, though perhaps not overwhelming, facts and assumptions as the basis for his opinion can highlight those weaknesses through effective cross-examination."<sup>116</sup> Finally, the Fifth Circuit has emphasized that "the trial court's role as gatekeeper is not tended to serve as a replacement for the adversary system".<sup>117</sup>

<sup>112</sup> See *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 265-266 (4th Cir. 1999).

<sup>113</sup> See *id.* at 265.

<sup>114</sup> *McCulloch v. H.B. Fuller Company*, 61 F.3d 1038, 1045 (2nd Cir. 1995).

<sup>115</sup> *Id.* at 1044.

<sup>116</sup> *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 414 (3d Cir.2002).

<sup>117</sup> *United States v. 14.38 Acres of Land Situated in Leflore Cnty., Miss.*, 80 F.3d 1074, 1078 (5th Cir. 1996)

## BIELSKIS V. LOUISVILLE LADDER

*A. The Facts*

Raymond Bielskis, an acoustical ceiling carpenter, occasionally required a scaffold in order to perform his job duties.<sup>118</sup> In 1997, Bielskis employer, R.G. Construction, provided him with an assembled Louisville Ladder SM 1404 mini-scaffold ladder.<sup>119</sup> The mini-scaffold was a four-foot long mobile unit with hinged sides allowing for collapsible storage, rungs for planks the user stands on, and four wheels that can be locked in place while in use.<sup>120</sup> Each wheel was screwed to a leg of the scaffold with a caster and threaded metal stem.<sup>121</sup>

In 2001, Bielskis began working for a new employer, International Decorators, who provided him with new scaffolding.<sup>122</sup> Thus, between 2001 and 2005, he had used his Louisville Ladder mini-scaffold on only one or two occasions to haul tools to and from his car.<sup>123</sup> On March 17, 2005, Bielskis used the Louisville Ladder mini-scaffold while working on ceiling tiles at a Motorola jobsite in Libertyville, Illinois because he lent the scaffolding supplied by International Decorators to his coworker.<sup>124</sup> After working on the mini-scaffold for several hours, Bielskis wheeled it into another room, stepped up onto the scaffold and began to work when the caster stem above one of the scaffold's wheels broke, causing him to collapse to the floor and suffer injuries to his hand and knee.<sup>125</sup> Bielskis brought a products liability design defect claim against the defendant ladder manufacturer, Louisville Ladder, under Illinois' risk-utility test.<sup>126</sup>

<sup>118</sup> Bielskis v. Louisville Ladder, Inc., 663 F.3d 887, 889 (7th Cir. 2011).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 890.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 889.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 889-890.

<sup>126</sup> *Id.* at 891. Bielskis also filed negligence, manufacturing defect, failure to warn, and res ipsa loquitur claims against Louisville Ladder.

*B. Plaintiff's Expert*

Bielskis retained mechanical engineer Neil J. Mizen to provide expert testimony as to what caused the scaffold's caster stem to break.<sup>127</sup> Mizen had extensive engineering experience: he obtained both a bachelor's and master's degree in Mechanical Engineering; developed packaging machinery and manufacturing processes at Cornell laboratory; founded Mizen Engineering Company, Inc., where he designed and built equipment and computer-based control systems used in manufacturing processes; and testified as an expert in a various cases pertaining to manufacturing and design flaws.<sup>128</sup>

Mizen provided a written report in which he opined that tensile stress<sup>129</sup> generated from over-tightening the caster during installation into the leg caused a brittle fracture in the threaded stud secured to the top flange of the caster.<sup>130</sup> He observed that the fractured surface revealed a clean break consistent with a brittle fracture, rather than a dull and fibrous appearance or plastic deformation common in ductile fractures.<sup>131</sup> He further concluded that the brittle fracture could have been avoided by either attaching the wheel with a different mechanism than the threaded stud, or by simply not over-tightening the stud.<sup>132</sup>

Mizen relied on his basic engineering background and experience, research pertaining to brittle fractures obtained from the internet, and an hour-long visual examination in forming his opinion that the caster stem failed due to a brittle fracture induced by over tightening.<sup>133</sup> He also observed the fracture at the end of the caster through a

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> The court explained tensile stress as the stress that leads to expansion (usually in length) while the volume stays constant; it is the opposite of compressive stress, which occurs when the material is under compression and the volume decreases. *Id.* at 892. Mizen defined tensile strength as "the ability of an object to resist tensile forces." *Id.*

<sup>130</sup> *Id.* at 891-892.

<sup>131</sup> *Id.* at 892. A ductile fracture is one "where the material pulls apart instead of snapping or cracking suddenly." *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 894-895.

microscope during the parties' joint inspection and reviewed the calculations generated by the defendant's expert.<sup>134</sup> Mizen did not, however, test his theory in an attempt to quantify the tensile strength of the caster stem or test his proposed alternate design.<sup>135</sup>

### *C. Defendant's Expert*

Louisville Ladder also retained an expert, Engineering Systems, Inc. ("ESI") who, concluded that the caster stem sustained a brittle fracture caused by *the loosening* of the caster stem.<sup>136</sup> ESI used digital calipers to measure the height between the HEX mating surface, the caster insert mating surface, and the corresponding fracture surfaces.<sup>137</sup> ESI also created positive and negative replicas of the caster stem in order to examine the fractured surfaces in detail.<sup>138</sup> Finally, ESI performed stress analysis calculations in order to assess the stresses present at the stud site with different degrees of tightness.<sup>139</sup>

### *D. The District Court Rejects Plaintiff's Expert's Methodology*

The defendant moved to bar Mizen's testimony under *Daubert*, arguing that his failure to test or examine the proposed design alternatives rendered his scientific methodology unreliable.<sup>140</sup> Although the district court found that Mizen's education and experience rendered him qualified to testify as an expert, it granted defendant's motion.<sup>141</sup> The district court held that absent testing or data reflecting an acceptance of his theory within the scientific community, Mizen's conclusion that the brittle fracture was caused by

<sup>134</sup> Brief of Appellant at 14-16, *Bielskis v. Louisville Ladder, Inc.*, 663 F.3d 887 (2011) (No. 10-1194), 2010 WL 3950497.

<sup>135</sup> *Bielskis*, 663 F.3d at 894-895.

<sup>136</sup> *Id.* at 892.

<sup>137</sup> *Id.* at 895.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 892.

<sup>141</sup> *Id.* at 894.

over tightening constituted nothing more than an illogical leap or an off-the-cuff conclusion.<sup>142</sup> The district court explained, “Bielskis's failure to establish admissibility under any single *Daubert* factor is not dispositive, but [his] failure to establish admissibility under any of the factors leaves the Court no choice but to bar Mizen's testimony.”<sup>143</sup> The district court then denied Bielskis' motion to reopen discovery in order to obtain a new liability expert and granted defendant's motion for summary judgment, as Bielskis could not establish his products liability claim without expert evidence.<sup>144</sup>

### *E. The Seventh Circuit Affirms*

Bielskis appealed to the Seventh Circuit, arguing that the district court abused its discretion by excluding Mizen's testimony.<sup>145</sup> Like the district court, the Seventh Circuit took issue with the reliability of Mizen's methodology and held that the district court did not abuse its discretion by barring Mizen's testimony as his methodology lacked “recognized hallmarks of scientific reliability.”<sup>146</sup> The court determined that Mizen used no particular methodology at all in reaching his conclusions as he failed to: (1) test the caster stem for measurements, alloy composition and tensile strength; (2) test his proposed design alternatives; (3) submit information demonstrating a consensus within the engineering community in support of his conclusion; or (4) subject his opinion to peer review as it was based on a visual examination.<sup>147</sup> The Seventh Circuit noted the discretion afforded to district courts in assessing the reliability of expert testimony: “we give the district court wide latitude in performing its gate-keeping function in determining both how to measure the reliability of expert testimony and whether the testimony itself is

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 896.

<sup>144</sup> *Id.* at 892.

<sup>145</sup> *Id.* at 893.

<sup>146</sup> *Id.* at 897.

<sup>147</sup> *Id.* at 895.

reliable”.<sup>148</sup> Thus, the Seventh Circuit deferred to the lower court’s belief that Mizen’s methodology amounted to nothing more than “talking off the cuff”—without data or analysis.”<sup>149</sup>

The Seventh Circuit also affirmed the district’s court’s denial of Bielskis’ motion for a continuance to obtain another expert.<sup>150</sup> The court observed that given the case-management nature of such a request, district courts have broad discretion when ruling whether or not a plaintiff should be allowed to retain another expert.<sup>151</sup> The court reasoned that granting Bielskis’ motion would give him a “second bite at the expert witness apple”, which would run afoul to notions of efficient case management.<sup>152</sup>

Lastly, the Seventh Circuit affirmed the district court’s entry of summary judgment in favor of Louisville Ladder.<sup>153</sup> The court gave credence to Bielskis’ argument that under Illinois law, product liability cases where the cause of action rests upon the assertion that the product failed “to perform in the manner reasonably to be expected”, (i.e. failed per the consumer expectation test) do not require expert testimony in order to establish a prima facie case.<sup>154</sup> However, the court denied Bielskis’ attempt to apply the consumer expectation test because he failed to establish a prima facie element to a manufacturing defect claim – that the mini-scaffold was defective at the time it left Louisville Ladder’s control.<sup>155</sup>

<sup>148</sup> *Id.* at 894 (citing *Gayton v. McCoy*, 593 F.3d 610, 616 (7th Cir.2010)).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 897.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 899.

<sup>154</sup> *Id.* at 898. As discussed in Part I of this note, the rule of law has since changed and now Illinois requires expert testimony to prove liability in complex products liability cases brought under both the consumer expectation test and products liability cases brought under the risk utility test. *See Show v. Ford Motor Co.*, 659 F.3d 584 (7th Cir. 2011).

<sup>155</sup> *Bielskis*, 663 F.3d at 898.



*F. Analysis*

The *Daubert* standard was designed to ensure that expert witnesses adhere to the same standards of intellectual rigor that are demanded in their professional work when testifying in court.<sup>156</sup> As gatekeepers, district courts are tasked with the duty of ensuring that an expert does not extrapolate from an accepted premise to an unfounded conclusion.<sup>157</sup> In order to ensure district courts are effective gatekeepers, they are afforded a great deal of discretion in deciding both whether to admit expert testimony as well as which criteria is used to make that decision.<sup>158</sup>

This judicial discretion should be exercised in conjunction with the spirit of Rule 702, which was originally enacted to offset *Frye*'s general acceptance test and its effect of diminishing judicial discretion by placing the admissibility determination into the hands of the scientific community.<sup>159</sup> The intent of the Rule was to relax the traditional barriers to the admission of opinion testimony by placing complete discretion back into the hands of the judiciary.<sup>160</sup> District courts should be mindful of this liberal intent when applying the *Daubert* factors to a reliability assessment, as rejection of expert testimony is the exception rather than the rule.<sup>161</sup>

This judicial discretion should also be exercised within the limits established by case law following the enactment of Rule 702. District courts do not have discretionary authority to "accept or reject" expert testimony, as this is part of the jury's fact finding role.<sup>162</sup> Further,

<sup>156</sup> See *Chapman v. Maytag Corp.*, 297 F.3d 682, 688 (7th Cir. 2002).

<sup>157</sup> See *Joiner*, 522 U.S. at 146 (explaining that a district court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").

<sup>158</sup> See *Kumho Tire*, 526 U.S. at 158.

<sup>159</sup> See *Hasko*, *supra* note 57 at 481-482.

<sup>160</sup> See *Daubert*, 509 U.S. at 579.

<sup>161</sup> SEE FED. R. EVID. 702 advisory committee's note.

<sup>162</sup> See FED. R. EVID. 702 advisory committee's note (stating, "the amendment is not intended to limit the right to jury trial, nor to permit a challenge to the testimony of every expert, nor to preclude the testimony of experience-based experts,

district courts do not have discretion to exclude shaky but admissible evidence as it is more appropriately attacked through cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.<sup>163</sup> Lastly, it is not within a district court's discretion to exclude expert testimony simply because all other potential causes cannot be disqualified, as the suggestion of an alternative cause affects the weight that the jury should give the expert's testimony rather than its admissibility.<sup>164</sup>

*Bielskis* illustrates how the perception of whether an admissibility determination is made in accordance with the spirit of Rule 702 and is within the common law limitations rests solely upon the reviewing judge's own subjective belief.<sup>165</sup> In *Bielskis*, the district court held that the plaintiff failed to establish its expert's admissibility under any of the *Daubert* factors.<sup>166</sup> The court particularly focused on the fact that plaintiff's expert did not personally test his theories, while the defendant's expert did perform physical testing.<sup>167</sup> However, the Seventh Circuit noted in *Cummins v. Lyle Industries* that hands-on testing or observations made by the expert himself is not an absolute prerequisite to the admission of expert testimony, as an expert's methodology may satisfy the reliability requirement for admissibility through the review of experimental, statistical, or scientific data generated by others in the field.<sup>168</sup> Mizen did just that - he reviewed the calculations generated by the defendant's expert in order to form his conclusions.<sup>169</sup> While it is possible for Mizen's review to be considered as reliable scientific method per *Cummins*, it certainly was not considered to be so under the Seventh Circuit's review in *Bielskis*.

nor to prohibit testimony based on competing methodologies within a field of expertise").

<sup>163</sup> See *Daubert*, 509 U.S. at 595.

<sup>164</sup> See *Westberry*, 178 F.3d at 265-266.

<sup>165</sup> *Bielskis*, 663 F.3d at 894.

<sup>166</sup> *Bielskis*, 663 F.3d at 896.

<sup>167</sup> *Id.* at 894.

<sup>168</sup> See *Cummins v. Lyle Industries*, 93 F.3d 362, 396 (7th Cir. 1996).

<sup>169</sup> Brief of Appellant at 14-16, *Bielskis v. Louisville Ladder, Inc.*, 663 F.3d 887 (2011) (No. 10-1194), 2010 WL 3950497.

Personal observation alone is not a substitute for scientific methodology and is insufficient to satisfy *Daubert*.<sup>170</sup> However, an opinion based upon observation as well as scientific knowledge and experience may constitute sufficient scientific methodology.<sup>171</sup> Experts tie observations to conclusions through the use of what Judge Learned Hand called “general truths derived from ... specialized experience.”<sup>172</sup> In *Bielskis*, Mizen explicitly explained that he based his opinion partly upon his engineering knowledge and experience.<sup>173</sup> Although courts may consider an application of specialized knowledge and experience as reliable scientific methodology in other instances, this was, again, not the case in *Bielskis*.

The district court was not necessarily wrong in its exclusion of Mizen - even if his opinions were based upon sound scientific methodology, he appeared to have a difficult time articulating what that methodology was.<sup>174</sup> Nonetheless, the district court’s holding serves as an illustration of the vast amount of discretion judges possess when determining admissibility on a case-by-case basis. Such a subjective determination is likely to lead to an inconsistent application of the *Daubert* factors among the district courts, which will in turn have a negative effect on litigants. For example, after granting the defendant’s motion to exclude Mizen, the district court then granted defendant’s motion for summary judgment since *Bielskis* could not establish his products liability claim without expert evidence.<sup>175</sup> Not only did the judge’s subjective dislike of Mizen’s methodology dismantle the plaintiff’s entire case, but it also likely cost the plaintiff a significant amount of money spent in preparation for litigation.

<sup>170</sup> *Chapman v. Maytag Corp.*, 297 F.3d 682, 688 (7th Cir. 2002).

<sup>171</sup> *Kumho Tire*, 526 U.S. at 148.

<sup>172</sup> *Kumho Tire*, 526 U.S. at 148-49 (quoting Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 54 (1901)).

<sup>173</sup> *Bielskis*, 663 F.3d at 894-895.

<sup>174</sup> *Id.* at 894 (explaining that “[w]hen questioned as to what scientific methodology he used to reach this conclusion, Mizen replied that he had relied on “basic engineering intelligence” and “solid engineering principles that any other engineer would use”).

<sup>175</sup> *Id.* at 899.

Given the broad discretion of the trial judge as well as the deferential standard of review on appeal, it is seemingly difficult to succeed in challenging a district court's reliability assessment.<sup>176</sup> Thus, the Seventh Circuit's affirmation of the district court's exclusion of Mizen was proper.

### CONCLUSION

Although the Seventh Circuit's affirmation was correct in light of the deferential standard of review on appeal, *Bielskis* illustrates the importance of ensuring that an expert's testimony is based on rigorous testing, rather than simply a visual observation, personal knowledge, or an examination of available opinions and data, in order to survive both judicial scrutiny in determining reliability as well as a motion for summary judgment should the district court find the expert unreliable. The discretion afforded by the admissibility inquiry under the Federal Rules of Evidence and *Daubert*, as well as the stringent standard of appellate review, gives trial judges unfettered ability to dismiss an expert, and thus completely dismantle a plaintiff's cause of action, based solely on the judge's subjective liking of that expert.

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<sup>176</sup> See *Joiner*, 522 U.S. at 141-142.